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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

PETTY MOTOR COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

Petitioner Petty Motor Company, defendant-appellee in the court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

QUESTIONS PRESENTED FOR REVIEW

When a United States marshal conducts a judicial foreclosure sale in accordance with state law procedure not involving seizure or levy and accepts a "credit bid," has the marshal "seized or levied on property" and "received or paid over money" so as to entitle the marshal to a commission under 28 U.S.C. § 1921 (1982)?

LIST OF ALL PARTIES TO PROCEEDING BELOW

Petitioner, Petty Motor Company and United States of America were the only parties to the proceeding in the court of appeals regarding the marshal fee.[1]

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[1]The foreclosure action caption in the district court is reproduced in its entirety at app. K. Parties to the foreclosure case were not necessary parties regarding the marshal's fee issue in the district court or the court of appeals. Petty Motor Company is a partnership. Its partners, at the time the foreclosure action was commenced, were Neuman C. Petty, Norma P. Strasser, Rachel P. Lunt, and Leila P. Shipp. Its partners at the present time are Neuman C. Petty, Norma P. Strasser, and Leila P. Shipp.

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OPINION BELOW

The opinion below is published as *United States v. Petty Motor Co.*, 767 F.2d 712 (10th Cir. 1985) and is reproduced in its entirety at app. A.

GROUND ON WHICH JURISDICTION IS INVOKED

The date of the judgment sought to be reviewed is July 12, 1985, which is also the date of entry. Rehearing was denied and the denial entered on August 12, 1985. Petitioner believes that jurisdiction is conferred on this court to review the judgment in question by writ of certiorari by 28 U.S.C. § 1254 (1982).

LEGAL PROVISIONS INVOLVED

28 U.S.C. § 1921 (1982) (reproduced in its entirety at app. G) provides in relevant part:

> Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:
>
> . . . .
>
> For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1½ per centum on the excess of any sum over $1,000.

28 U.S.C. § 2001 (1982) (reproduced in its entirety at app. H) provides in relevant part:

> (a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Fed. R. Civ. P. 69 (reproduced in its entirety at app. I) provides in relevant part:

> (a) *In General*. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Utah R. Civ. P. 69 (reproduced in its entirety at app. J), in part, provides the state procedure for judicial foreclosure sales.

STATEMENT OF THE CASE

The United States marshal's deputy ("the marshal") conducted a judicial foreclosure sale of certain real property on March 9, 1983 as a result of a Small Business Administration foreclosure action (the basis for federal jurisdiction was 28 U.S.C. § 1345 (1982)) in federal district court, and pursuant to a decree of foreclosure dated September 24, 1982. The sale was conducted in accordance with state law procedure for such sales. At the sale, petitioner gave the high bid when it bid the amount of its lien. Because petitioner's lien was a first lien,[2] or lien with first priority, and based on agreement or discussion with the deputy prior to the sale, no cash was paid by petitioner or received by the marshal for the bid, i.e., only a "credit bid" was made.

Petitioner contends that 28 U.S.C. § 1921 (1982) does not provide for the payment of a commission to the marshal here because the marshal (1) did not seize or levy on property, and (2) did not

---

[2]Petty Motor Company is the assignee of the judgment of Ford Motor Credit Company ("Ford Credit") in the foreclosure action. A decree of foreclosure, (app. C), established priorities for (a) $50,000 advanced by Ford Credit and (b) taxes paid by Ford Credit and Petty Motor Company. By a subsequent memorandum decision and order, (app. D), the court resolved the question of the priority among Ford Credit, Petty Motor Company, and the United States of America, with Ford Credit first, United States of America in second position, and Petty Motor Company in third lien position. The bid of Petty Motor Company represented the amount advanced by Ford Credit, the taxes paid by Ford Credit and Petty Motor Company, and Ford Credit's first lien position; it did not include any amount represented by Petty Motor Company's separate, third lien position.

receive and pay over money. The marshal merely disposed of the property by sale, performing only one of three acts necessary to entitle him to a fee.

The district court determined that the marshal did not receive and pay over money, and therefore determined that no commission was owed to the marshal. The court of appeals reversed and remanded, directing that the marshal be paid a commission.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE TENTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The decision of the Tenth Circuit Court of Appeals is in direct conflict with every decision in other federal circuits on the question of whether such a judicial foreclosure constitutes seizure or levy under 28 U.S.C. § 1921. See *Federal Land Bank v. Hassler,* 595 F.2d 356 (6th Cir. 1979); *James T. Barnes & Co. v. United States,* 593 F.2d 352 (8th Cir. 1979); *Travelers Insurance Company v. Lawrence,* 509 F.2d 83 (9th Cir. 1974). The anomalous approach of the Tenth Circuit subjects petitioner to a substantial commission that, in all likelihood, would not be imposed anywhere else in the country.

This case presents a simple question of law on undisputed facts. The issue should be resolved to assure that any imposition of marshal fees is fair and consistent in the federal courts.[3]

---

[3] Petitioner is aware that since the decision in this case, this issue has arisen again in the Tenth Circuit in companion cases: *Northwestern National Life Insurance Co. v. Phillips,* No. 83-281C (E.D. Okla. August 13, 1985) (order confirming marshal's sale) and *Northwestern National Life Insurance Co. v. Jackie L. Phillips Farms, Inc.,* No. 83-282C (E.D. Okla. August 13, 1985)(order confirming marshal's sale). There the marshal claims approximately $12,000.

II. THE TENTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION WHICH REFUSES TO APPLY FED. R. CIV. P. 69, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, AND IN CONFLICT WITH ITS DECISION IN ANOTHER CASE.

The Tenth Circuit in this case decided that Fed. R. Civ. P. 69(a), is not applicable to a judicial foreclosure sale. 767 F.2d at 715. *Travelers Insurance Company* and *Hassler* decided otherwise.

The Tenth Circuit Court has found Fed. R. Civ. P. 69(a) applicable in an instance which appears to require its application in the present case. See *International Paper Co. v. Whitson*, 595 F.2d 559, 562 (10th Cir. 1979), discussed in Point II of petitioner's argument.

ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

POINT I. AN ORDINARY REAL PROPERTY FORECLOSURE SALE DOES NOT INVOLVE A "SEIZURE" OR "LEVY" UNDER 28 U.S.C. § 1921, AS ALL OTHER FEDERAL COURTS OF APPEAL HAVE HELD.

Through 28 U.S.C. § 1921, fees are imposed upon private litigants for certain services provided by United States marshals. Congress intended that the fees bear an economic relationship to the cost to the Government of providing the services but recognized a "need to avoid raising the cost of litigation to a prohibitive level." H.R. REP. No. 1724, 87th Cong., 2d Sess. 2 (1962). However, the fee charged here is extremely disproportionate to the value or cost of the services rendered by the marshal.

The construction of 28 U.S.C. § 1921 rendered by the Tenth Circuit makes no economic sense because the Tenth Circuit has given no substance to the statutory requirement that the marshal must seize or levy to earn the fee. Here, the marshal never did anything that could constitute "seizing or levying" by any definition.[4] The marshal

[4]Thus regardless of (1) whether a judicial foreclosure sale must be conducted according to state law procedure, *cf.* Fed. R. Civ. P. 64 and 69 (state law procedure to be followed for attachment, execution, and "proceedings supplementary to express and in aid of a judgment"), or not, *cf.* 28 U.S.C. 2001 (no express direction on whether state law procedure applies in a judicial foreclosure sale) and (2) whether a federal or state law definition of "seizure" and "levy" applies, the marshal did not earn the fee.

simply disposed of the property by sale and nothing more. The Tenth Circuit's construction of 28 U.S.C. § 1921 expands the marshal's right to a commission far beyond the statute's language and intent by ignoring the express requirement of the statute that seizure or levy is necessary to earn the commission.

The common law rule is that a levy or seizure is not required in a judicial sale. The common law suggests a distinction between execution sales and judicial sales:

> The unique characteristics of a judicial sale, as that term is used in this article, would seem clearly to distinguish such sales from execution sales, which are not made pursuant to a judicial order or decree, but under final process, that is, by a writ, issued by the clerk of the court, which does not direct the sale of specifically designated property, does not prescribe the mode of sale, and does not impose conditions on the sale, but merely requires ministerial action by a designated officer to levy on property of a judgment debtor and sell it as prescribed by statute to satisfy a money judgment. . . .
>
> . . . Thus the rules governing judicial sales, instead of the statutory provisions regulating execution sales, have been applied to a sale *in a mortgage foreclosure proceeding* under a special execution, since *such proceedings give rise to a special case, which is in the nature of a proceeding in rem wherein the decree of the court operates directly on the mortgaged property and no levy or seizure is necessary to give effect to the judgment.*

47 Am. Jur. 2d *Judicial Sales* § 3 (1969) (emphasis added).

In *Travelers Insurance Co. v. Lawrence*, 509 F.2d 83 (9th Cir. 1974), the court denied the marshal's claim for a 28 U.S.C. § 1921 commission for services essentially identical to those performed here. The court distinguished judicial foreclosure sales in which the real property already is under the jurisdiction of the court and already subject to preexisting liens from execution sales in which generally seizure or levy is necessary to create the lien and make the property subject to sale. The court expressly rejected the approach taken in *Hill v. Whitlock Oil Services, Inc.*, 450 F.2d 170 (10th Cir. 1971), in which case the Tenth Circuit held that the marshal "in effect levied," *id.* at 174, where he conducted a judicial foreclosure sale

pursuant to court order even though the *Hill* court observed that there was no actual seizure or levy.

In *Federal Land Bank v. Hassler*, 595 F.2d 356 (6th Cir. 1979) and in *James T. Barnes & Co. v. United States*, 593 F.2d 352 (8th Cir. 1979), the Sixth and Eighth Circuits almost simultaneously adopted the persuasive *Travelers Insurance* rationale that a commission for seizure or levy is not due unless a seizure or levy actually occurs.

A judicial foreclosure sale does not require the marshal to seize or levy on property. The marshal does not create a lien by a foreclosure sale as such lien is created by the recording of the security instrument, in this case a trust deed, with the county recorder's office. Consequently, the marshal does not seize or levy on property, and is not entitled to a statutory fee for selling property.

Candidly recognizing the conflict of *Hill* with *Travelers Insurance*, *Hassler*, and *James T. Barnes & Co.*, the court of appeals in this case reaffirmed *Hill* even though seeming to reject *Hill's* logic. *Hill* had been premised on the court's view that judicial sales and execution sales must be treated as the same thing for purposes of 28 U.S.C. § 1921 in order to avoid "fine distinctions." 450 F.2d at 174. Now for purposes of Fed. R. Civ. P. 69(a), the court in this case took the view that "[i]t is . . . unassailable that a judicial sale on a mortgage foreclosure is not the same as execution on a judgment." 767 F.2d at 715.

Whether or not the two decisions of the Tenth Circuit are internally consistent, the Tenth Circuit has reached a result directly contrary to the holding in the Sixth, Eighth, and Ninth Circuits. If the decision of the court of appeals here stands, petitioner will be subjected to a commission of over $20,000 that would not be charged at all elsewhere in the country. Petitioner respectfully submits that the conflict should be resolved.

POINT II. RULE 69(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRES THAT STATE PRACTICE AND PROCEDURE BE FOLLOWED IN PROCEEDINGS SUPPLEMENTARY TO AND IN AID OF A JUDGMENT.

Fed. R. Civ. P. 69(a) requires application of state law procedure to the sale, and under Utah law no seizure or levy occurs in a judicial sale. Rule 69(a) provides in pertinent part:

> The procedure on execution, *in proceedings supplementary to and in aid of a judgment* and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that *any statute of the United States governs to the extent that it is applicable*.

(Emphasis added.)

By its terms, Rule 69(a) is not limited to procedure on execution, but rather contains the language making it applicable to "proceedings supplementary to and in aid of a judgment." A sale of realty following a judicial foreclosure, whether called a "judicial sale," "foreclosure sale" or "sherriff's sale," constitutes a proceeding supplementary to and in aid of a judgment. Accordingly, Rule 69(a) is applicable except to the extent that a statute of the United States is applicable, in which case the United States statute governs.

The courts in *Travelers Insurance Company* and *Hassler* specifically held that Rule 69(a) requires that state law be followed in a judicial sale. *Hill* did not consider Rule 69(a) and its effect on whether state law is applicable in determining whether there has been a seizure or levy of property. But the Tenth Circuit has applied Rule 69(a) in similar circumstances.In *International Paper Co. v. Whitson*, 595 F.2d 559 (10th Cir. 1979), the United States was awarded foreclosure of a Department of Housing and Urban Development mortgage on certain real property. After sale, a deficiency remained. State law required that a motion for any deficiency judgment be filed within 90 days after the sale. The court held that state law applied to the sale by virtue of Rule 69(a), and therefore a motion of the United States for a deficiency after the 90-day period was too late. *See generally* 7 [Part 2], J. Moore, J. Lucas, & K. Sinclair, Moore's Federal Practice, ¶ 69.04[3] (1985 & Supp. 1984-85).

The application of Rule 69(a) in *International Paper* is wholly inconsistent with the court's refusal to apply Rule 69(a) in this case.

In its decision here, the court refers to 28 U.S.C. § 2001 and states that a sale of realty under that section is distinct from a sale under Rule 69(a). 767 F.2d at 715. However, 28 U.S.C. § 2001 is consistent with the decisions of the Sixth, Eighth, and Ninth Circuits that state law should be followed. There is no conflict between the provisions of 28 U.S.C. § 2001(a) and the provisions of Rule 69(a) inasmuch as the statute of the United States governs "to the extent that it is applicable." 28 U.S.C. § 2001 is applicable only insofar as it requires the property to be sold in whole or in parcels, at a specified location, and upon terms and conditions that the court directs. 28 U.S.C. § 2001(a) provides in pertinent part:

> Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Here the district court simply directed that the sale be conducted in "the manner prescribed by law." (Decree of Foreclosure, app. C). As no federal procedure exists, this could mean only that state law was to be followed, and in fact, in this case, "[t]he marshal proceeded to publish and post notice of the sale and to conduct the sale itself in the same way as a judicial foreclosure would be conducted in the courts of the state of Utah." 767 F.2d at 714 (footnote omitted).

Courts have simultaneously applied 28 U.S.C. § 2001(a) and state law procedure. In *United States v. Smith*, 479 F. Supp. 804 (N.D. Ga. 1979), the court determined that the "terms and conditions" directed by the court under 28 U.S.C. § 2001(a) included the requirement in the decree of foreclosure and sale that the marshal would "make a report of the sale to this Court for confirmation." 479 F. Supp. at 806. In considering the criteria for confirmation, the court looked to the requirements of state law. Accordingly, the court concluded that "in obtaining marketable title to the property, state law may, and should, be followed." *Id.* at 807. In *Bowl-Opp, Inc. v. Larson*, 334 F. Supp. 222 (E.D. La. 1971), the court held

that Louisiana state law regarding appraisal in public sales in order to qualify for a deficiency judgment was applicable, notwithstanding a sale made pursuant to 28 U.S.C. § 2001.

As required by Rule 69(a) and consistent with 28 U.S.C. § 2001, the foreclosure sale in this case followed Utah state practice and procedure. The decision of the Tenth Circuit is inconsistent with decisions of the Sixth and Ninth Circuits, and inconsistent with its own decision in another case, as to the applicability of Rule 69(a).

POINT III. THE DISTRICT COURT CORRECTLY FOUND THE MARSHAL DID NOT RECEIVE AND PAY OVER MONEY AS REQUIRED BY 28 U.S.C. § 1921.

The marshal did not receive money at the foreclosure sale and did not pay over money after the sale. Inasmuch as the provisions of 28 U.S.C. § 1921 must be strictly construed, *United States v. Pommerening*, 500 F.2d 92, 102 (10th Cir. 1974), a credit bid does not satisfy the requirement of receiving and paying over money.

As stated above, petitioner contends that the state procedures were applicable here under Fed. R. Civ. P. 69(a). As also stated above, 28 U.S.C. § 2001 provides the sale shall be upon such terms and conditions as the court directs. In this case the court directed that the sale be by public auction "in the manner prescribed by law," and the marshal conducted the sale in the same way as a judicial sale would be conducted under state procedure. Under applicable state law, no commission is earned "when no money changes hands, and such a provision cannot be implied, because the rule of strict construction must control in the interpretation of a statute of this kind." *Peery v. Wright*, 13 Utah 480, 483, 45 P. 46, 47 (1896).

Despite contrary dictum, the holding in *Federal Land Bank v. Hassler*, 595 F.2d 356 (6th Cir. 1979) is consistent with this position. There the district court's order provided for payment of the bid amount to the clerk. Because the marshal did not receive and pay over money, the court ruled that the marshal did not satisfy the requirements of 28 U.S.C. § 1921. That conclusion suggests that the requirements of 28 U.S.C. § 1921 must be strictly complied with; any requirement not satisfied precludes any obligation to pay the fee. Since money was not received and paid over, the marshal

did not perform the services required for the commission. 595 F.2d at 357-58.

The decision of the Tenth Circuit in this case, that " a constructive transfer of funds" occurred, 767 F.2d at 715, is contrary to the express language of 28 U.S.C. § 1921, which permits a commission *only* after receipt and payment of money.

CONCLUSION

The decision of the court of appeals revives a conflict between federal courts of appeals and is sustained only by use of the two judicial fictions that: (1) the requirement of seizure or levy was met in a judicial sale without an actual seizure or levy or any similar act, and (2) the requirement of receipt and payment of money was met by a credit bid without an actual receipt and payment. A further conflict exists as to the applicability of Fed. R. Civ. P. 69(a). Petitioner respectfully submits that this Court should resolve the conflict of decisions among the federal courts of appeals and that certiorari should be granted for that purpose.

Respectfully submitted, November _____, 1985.

MOYLE & DRAPER, P.C.

By_____
Wayne G. Petty
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of November, 1985, I mailed, by depositing in a United States post office or mailbox, with first-class postage prepaid, three copies of this Petition for Writ of Certiorari to the following:

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

PETTY MOTOR COMPANY

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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[767 F.2d at 713] Charles T. Myers, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C. (J. Paul McGrath, Asst. Atty. Gen., Richard K. Willard, Acting Asst. Atty. Gen., Washington, D.C., Brent D. Ward, U.S. Atty., Dist. of Utah, Salt Lake City, Utah, and William G. Kanter, Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., with him on the briefs), for plaintiff-appellant.

APPENDIX A

[767 F.2d 712]
UNITED STATES of America,
Plaintiff-Appellant,

v.
PETTY MOTOR COMPANY,
Defendant-Appellee,

and

Colonial Ford, Incorporated, et al., Defendants.

No. 83-1724.

United States Court of Appeals,
Tenth Circuit.

July 12, 1985.

Rehearing Denied Aug. 13, 1985.

Wayne G. Petty of Moyle & Draper, P.C., of Salt Lake City, Utah, for defendant-appellee.

Before LOGAN, DOYLE and MOORE, Circuit Judges.

JOHN P. MOORE, Circuit Judge.

This is an appeal by the United States from an order of the District Court of Utah denying the United States marshal a commission for services related to sale of real property pursuant to a judicial foreclosure of a real estate mortgage. The purchaser, Petty Motor Company (Petty), paid no cash for the subject property, but by agreement of the interested parties, bid the amount of the indebtedness (including the mortgage amount) at the time of the sale. The marshal demanded a commission for conducting the sale, relying on 28 U.S.C. § 1921. Claiming the marshal was not entitled to the commission, Petty deposited the amount of the commission with the clerk of the court and promptly filed a motion for the court to determine the proper fee. In an abbreviated order, the court determined that the marshal had not fully complied with § 1921 and, thus, was not entitled to the commission. We conclude the trial court erred, and we reverse.

The foreclosure action from which the United States appeals was itself the product of multifaceted diversity litigation against Colonial Ford, Inc. (Colonial). In the only part of that litigation germane to this appeal, Ford Motor Credit Company sought judicial foreclosure of a real estate mortgage on the property of Colonial. In a decree of foreclosure following stipulation by the parties, the trial court in part ordered:

> The property described hereinafter is to be sold at public auction by the United States Marshal *in the manner prescribed by law*[1] for such sale; . . . and out of the proceeds of such sale shall retain first his costs, disbursements *and commissions* . . .

(Emphasis added.)
Thereafter, upon resolution of the matter of priority among several creditors, the court entered a separate order of sale, which provided in part: [767 F.2d 714]

> [I]T IS ORDERED . . . that the land and premises mentioned and described in the said . . . Decree be sold at public auction, as in said . . . [foreclosure] Decree . . . .
>
> [T]he said United States Marshal [is] hereby commanded . . . to proceed . . . and to do all things *according to the terms and requirements of said . . . Decree . . . and the provisions of the statutes in such cases made and provided.*

(Emphasis added.)

The marshal proceeded to publish and post notice of the sale and to conduct the sale itself in the same way as a judicial foreclosure would be conducted in the courts of the state of Utah.[2] Petty obtained the lien rights of Ford Motor Credit Company and used those rights in exercising a "credit bid" at the sale.

If the marshal is entitled to a commission from this transaction, his entitlement is found exclusively in 28 U.S.C. § 1921, which states:

> Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:
>
> . . . .
>
> For seizing or levying on property . . . disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1½ per centum on the excess of any sum over $1,000 . . . .

The trial court concluded, without explanation, that because the marshal had not received or paid over money as set forth in § 1921, he was not entitled to the statutory commission.

[1]Whether the court meant Utah law or 28 U.S.C. §2001 is unclear from the language of the order.

[2]Why he did so is not disclosed in the record.

The government contends that the trial court's conclusion is inconsistent with *Hill v. Whitlock Oil Services, Inc.*, 450 F.2d 170 (10th Cir. 1971). We agree. *Hill* established several important principles, not the least of which is that § 1921 exists for the purpose of remibursing the federal government for services rendered to private litigants by marshals. *Hill* also reminds us that the statute was adopted to achieve uniformity of payment for these services throughout the land. Finally, *Hill* established whether the services rendered by the marshal qualify for compensation is a matter of federal, not state, law.

Petty argues that *Hill* is wrong and should not be followed. Petty postulates that § 1921 must be read in conjunction with Fed. R. Civ. P. 69(a) so that state law will define whether the marshal is entitled to a commission despite the underlying purpose of uniformity in § 1921. Fed. R. Civ. P. 69(a) provides that federal district courts should follow the "practice and procedure" of the state in which they sit in proceedings surrounding the execution of a judgment, "except that any statute of the United States governs to the extent that it is applicable." Petty finds support in cases from other circuits that have disagreed with the result in *Hill*.[3] Notwithstanding, *Hill* established the rule in this circuit and, as such, is binding upon the district court. We have reexamined *Hill* in light of the cases in other circuits and conclude that *Hill* was correctly decided and, hence, should be reaffirmed.

In *Hill* we said:

> Federal, not local, law applies in the interpretation and application of federal statutes. . . . *The question is not the type of sale under Kansas law* but whether § 1921 authorizes a commission to a marshal for a judicial sale such as was made here.
>
> . . . .
>
> The controlling consideration here is legislative intent. The crux of the matter is whether Congress, by using the words "seizing or levying," intended to include judicial sales. In an execution sale, the selling officer is authorized

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[3]*See Travelers Insurance Co. v. Lawrence*, 509 F.2d 83 (9th Cir. 1974); *James T. Barnes & Co. v. United States*, 593 F.2d 352 (8th Cir. 1979); *Federal Land Bank of St. Paul v. Hassler*, 595 F.2d 356 (6th Cir. 1979).

> by the writ of execution and is guided by [767 F.2d at 715] the law rather than by the court. In a judicial sale, the court controls and the person making the sale acts as agent for the court.
>
> . . . .
>
> In the case at hand, the Marshal took control of the land under a court order to hold a foreclosure sale for the satisfaction of a judgment. The fact that he did not go on the land and take actual possession is not pertinent. Under the court order he in effect levied on the land.

450 F.2d at 173-174 (emphasis added) (citations omitted).

The Ninth Circuit scrutinized this conclusion in *Travelers Insurance Co. v. Lawrence*, 509 F.2d 83 (9th Cir. 1974), a foreclosure case in which the district court had imposed a marshal's commission pursuant to 28 U.S.C. § 1921. The court of appeals reversed, holding that Fed. R. Civ. P. 69(a) applied to the marshal's sale and that Rule 69(a) and § 1921 are "interrelated." We disagree.

First, the very language of Rule 69(a) makes clear that its scope is circumscribed to execution and process in aid of execution. A judicial foreclosure by nature falls outside the realm of post-judgment satisfaction. That fact alone should obviate any consideration of Rule 69(a) in a judicial foreclosure sale.

Second, the court in *Travelers* premised applicability of Rule 69(a) on three Supreme Court cases: *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966) (a case dealing with the question of whether the federal government was bound by a state coverture law in a federal court suit upon a contract); *Custer v. McCutcheon*, 283 U.S. 514, 51 S.Ct. 530, 75 L.Ed. 1239 (1931) (a case dealing with the question of whether in a diversity action a state statute governing execution process applied to judgment executions); and *Fink v. O'Neil*, 106 U.S. 272, 1 S.Ct. 325, 27 L.Ed. 196 (1882) (a case dealing with the question of whether a state law governed proceedings in levy and execution in a federal court judgment). We believe that these cases are inapposite to the issue of whether § 1921 calls for payment of the marshal following a judicial foreclosure sale.

There can be no doubt that Rule 69(a) and its statutory predecessor considered by the Supreme Court in *Custer* and *Fink* made state

process applicable to *judgment execution* in federal courts. It is just as unassailable that a judicial sale on a mortgage foreclosure is not the same as execution on a judgment.

As noted by Judge Breitenstein in *Hill*, a judicial sale is within the control of the court because the court sets the standards (procedure) under which the sale will be conducted. By contrast, executions "issue by mere praecipe of the judgment creditor . . . and only come under judicial supervision on complaint of either party." *Yazoo & M.V.R. v. Clarksdale*, 257 U.S. 10, 19, 42 S.Ct. 27,29,66 L.Ed. 104 (1921). Accordingly, to satisfy the need for standards under which the execution will proceed, Rule 69(a) has been adopted. *See* Fed. R. Civ. P. 69(a) advisory committee note.

Although Rule 69(a) contemplates the possibility of a judicially ordered sale to effect execution on a judgment, that sale is distinct from the sale of realty dealt with and governed by 28 U.S.C. § 2001. When land is sold by a foreclosure decree, the court effectively orders a "levy" of that land as that concept is embodied in 28 U.S.C. § 1921. *See Hill*, 450 F.2d at 174. We believe the same reasoning should apply to the concept of receipt and payment of money as the statute uses those terms.

Although Petty contends there could be no constructive transfer of money when a credit bid is accepted, the predicate for this contention is state law. Having disposed of the applicability of state law to federal diversity mortgage foreclosures, we find no merit in this contention. We believe the credit bid in this case was a constructive transfer of funds. *See, e.g., The Cesare Augusto*, 39 F.Supp. 751 (N.D.Cal. 1941). Imposition of a requirement for actual transfer of cash in cases of this nature ignores the reality and the economic effect [767 F.2d at 716] of the credit transaction and thereby frustrates the intent of Congress that private parties pay the cost of the services rendered to them by the government.

We conclude that the procedure followed in effecting the judicial sale of land after foreclosure of a real estate mortgage should not affect whether the United States marshal is entitled to a commission under 28 U.S.C. § 1921. Instead, the determinative factors are whether the marshal has carried out the directives of the court and

whether those directives effectively lead to satisfaction of § 1921's conditions in accordance with principles of federal law. In this instance, because the court's order provided for sale of real property by foreclosure and for payment of a commission to the marshal; and because the services the marshal rendered amounted to levy and seizure of property and to receipt and payment of money, the trial court erred in denying the marshal his statutory commission.

We reverse and remand, directing that the district court enter an order granting the United States marshal a commission in accordance with 28 U.S.C. § 1921.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
COLONIAL FORD, INCORPORATED, et al,
Defendants.

Civil No: C-78-0256W
ORDER DENYING COMMISSION TO UNITED STATES MARSHAL IN CONNECTION WITH SALE

COLONIAL FORD, INC.,
Plaintiff,
vs.
FORD MOTOR CREDIT COMPANY,
Defendant

Civil No: C-75-190W

COLONIAL FORD, INC.,
Plaintiff,
vs.
FORD MOTOR COMPANY and FORD MOTOR CREDIT COMPANY,
Defendants.

Civil No: C-79-0364

A hearing on motion to determine U.S. Marshal's proper fees was held March 28, 1983. The United States of America was represented by Charles William Ryan. Wayne G. Petty represented Petty Motor. Prior to the hearing the court had read the memoranda of counsel. Following argument and after taking the motion under advisement, the court has further considered the law and facts including having read *Hill v. Whitlock*, 450 F.2d 170, 173-174 (10th Cir. 1971); *Travellers v. Lawrence*, 355 F. Supp. 98 (D.C. Ore. 1973), 509 F.2d 83 (9th Cir. 1974); *Barnes v. United States*, 593 F.2d 352 (8th Cir. 1979); *Federal Land Bank v. Hassler*, 595 F.2d 356 (6th Cir. 1979). Being now fully advised,

IT IS HEREBY ORDERED that the only fees due to the United States Marshal as a result of services rendered attending the March 9, 1983 sale are the actual costs of the sale in the approximate amount of $211.14. The same shall immediately be remitted to the U.S. Marshal. No commission is due the U.S. Marshal for the sale inasmuch as the court holds that, given the manner in which the sale was conducted, there was no "receiving and paying over money," that being one of the requirements for payment of a commission under 28 U.S.C. § 1921.

Dated this 4th day of April, 1983.

/s/
David K. Winder
United States District Judge

Mailed a copy of the foregoing Order to the following named counsel this 4 day of April, 1983.

Wayne G. Petty, Esq.
600 Deseret Plaza
15 East First South
Salt Lake City, Utah 84111

Charles William Ryan
Assistant U.S. Attorney
P.O. Box 2750
Salt Lake City, Utah 84110

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COLONIAL FORD,
INCORPORATED,
et al,
Defendants.

D E C R E E
(Schedule C)
Civil No. C-78-0256W

COLONIAL FORD, INC.,
Plaintiff,

vs.

FORD MOTOR CREDIT
COMPANY,
Defendant.

Civil No C-75-190W

COLONIAL FORD, INC.,
Plaintiff,

vs.

FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Defendants.

Civil No. C-79-0364

---

1. The defendant Colonial Ford, Inc. is indebted to the defendant, Ford Motor Credit Company, in the amount of One Million Two Hundred Fifty Thousand dollars ($1,250,000), said sum representing the mortgage loan principal and interest of $1,200,000 plus the additional amount of $50,000 as provided in Paragraph 6 of this Decree.

2. The defendant Colonial Ford, Inc. is indebted to the plaintiff, United States of America in the amount of Three Hundred Forty-Five Thousand Dollars ($345,000), which represents the full principal amount of its loan to Colonial Ford, Inc.

3. The defendant Colonial Ford, Inc. is indebted to defendant, Petty Motor Company in the amount of Four Hundred Ten Thousand Dollars ($410,000).

4. The priority among Ford Motor Credit Company, the United States of America and Petty Motor Company is as follows: [to be determined by the Court pursuant to Paragraph 10 of the Settlement Agreement and entered, according to such determination, here.]

5. The defendant Colonial Ford, Inc. is indebted to, and the subject property is subject to the claims of, the following creditors in the maximum agreed amounts:

Defendant	*Amount*
Col-Lou Investment & Realty Co.	708.00
Utah State Tax Commission	21,116.00
Doris Belnap, Assignee of First Security Bank	3,368.00
Internal Revenue Service	556.00
Crus Distributing Company	680.00
Nord Advertising Company	4,644.00
Hal B. Heiner	1,432.00
Newspaper Agency Corporation	3,392.00
Terminal Service Company	320.00

Apache Tire Center	884.00
Dealer Method Service	2,900.00
	$40,000.00

The liens, claims and judgments of the foregoing are junior to the priorities of the parties listed in paragraph 4 above. As among the foregoing, the priorities are in the order and in the amounts listed in this paragraph.

6. The property described hereinafter is to be sold at public auction by the United States Marshal in the manner prescribed by law for such sale; that said Marshal, if and when the subject premises are sold by him, and out of the proceeds of such sale shall retain first his costs, disbursements and commissions, and then pay to real estate tax creditors $85,739.32, plus interest at 8% per annum from March 16, 1981, then to pay the defendant Ford Motor Credit Company, or to its attorney, the sum of Fifty Thousand Dollars ($50,000) plus interest on the aforesaid $50,000 accruing with interest at the rate of fiteen percent per annum from the date of the Settlement Agreement previously entered to the date of sale, and the surplus, if any, shall be accounted for and paid over to the Clerk of this Court subject to this Court's further order. The property to be sold by the United States Marshal pursuant to the decree is the real property of Colonial Ford located in Salt Lake County, including the property described in that certain Deed of Trust bewteen Colonial Ford, Inc., as Grantor and Ford Motor Credit Company as Grantee, described as follows:

> Beginning at a point in the West line of State Street which is West 33 feet and North 192.0 feet from the Southeast corner of Lot 1, Block 16, Ten Acre Plat "A," Big Field Survey, and running thence North along said West line of State Street 235.31 feet; thence West 295.74 feet; thence South 143.51 feet to a fence; thence West along said fence 398.07 feet, more or less to the East line of Main Street; thence South along the East line of Main Street 284.9 feet, more or less to a point which is East 33 feet from the Southwest corner Lot 1, Block 16, Ten Acre

Plat "A," Big Field Survey, said point also being the Northeast corner of 3900 South and Main Street; thence East 428.0 feet along the North line of 3900 South Street; thence North 150.0 feet; thence East 100.0 feet; thence North 42.0 feet; thence East 165.0 feet to the point of beginning. Together with all buildings, improvements, appurtenances, furniture, fixtures and inventory, now or hereafter constructed upon, attached to, installed in, stored in, or used upon or in connection with said property.

Beginning at a point 33 feet East and 291.4 feet north from the Southwest corner of Lot 1, Block 16, Ten Acre Plat "A," Big Field Survey, and running thence South 6.50 feet; thence East 397.92 feet; thence North 6.50 feet; thence West 397.92 feet to the point of beginning.

7. Such sale by the United States Marshal shall take place thirty days after the Court has rules on the Motions for Summary Judgment as provided in paragraph 10 of the Settlement Agreement, or as soon thereafter as possible, unless the indebtedness stated in paragraphs 1 through 4 is extinguished as provided in the Settlement Agreement. Such sale shall not be stayed in connection with any appeal of such rulings; provided, however, that in the event of any appeal, the proceeds of the sale shall at the request of the appealing party be placed and held in an interest bearing escrow account if a sufficient supersedeas bond is posted. If the United States of America is the appealing party, no supersedeas bond is required. The successful party at the sale, and thereafter the person or entity who redeems, if any, shall be entitled to possession of the property and the rents derived therefrom as of the date of sale or redemption as the case may be.

8. All persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption. Any party junior to Petty Motor Company may redeem from Petty Motor Company for the amount of $250,000 plus the amount of any liens or claims prior to Petty Motor Company. From and after the expiration of the period of redemption as provided by law, the parties above named, and each of them, and all persons claiming

by, through or under them, or any of them, shall be forever barred and foreclosed of all right, title, interest and estate in and to the subject premises and that from and after the delivery of the Marshal's deed of the subject premises to the grantee named therein be given possession thereof.

DATE this 29th day of Sept. 1982.

BY THE COURT:

/s/

DAVID K. WINDER
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs. Civil No: C-78-0256
COLONIAL FORD, et al, Defendants. MEMORANDUM DECISION AND ORDER

COLONIAL FORD, INC.,
Plaintiff,
vs. Civil No: C-75-190
FORD MOTOR CREDIT COMPANY,
Defendant

COLONIAL FORD, INC.,
Plaintiff,
vs. Civil No: C-79-0364
FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Defendants.

Various motions were argued on November 4, 1982. Appearances were as follows: Kenneth L. Rothey for Colonial Ford, R. Brent Stephens for Ford Motor Credit, Stanford B. Owen for Ford Motor, Wayne Petty for Petty Motor and Charles William Ryan for United States of America and its Small Business Administrator. Following argument the motions were taken under advisement. Being now fully advised, the court renders the following decision.

I. MOTIONS

Ford Motor Credit, the United States of America and Petty Motor have each moved for summary judgment. A settlement agreement between the parties and this court's order of October 12, 1982 have narrowed the motions to a request for the resolution of a single question: What should the order of priority be among Ford Credit, the United States and Petty Motor. The determination to that question would also satisfy the motion to alter or amend filed October 25, 1982.

II. FACTS

This court does not find a genuine issue exists as to any material fact, nor has any party contended such exists. Accordingly, summary judgment is appropriate for these motions. Under local rule 5(e), the court finds the facts as they pertain to these motions to be as follows: On May 15, 1975, Colonial instituted an action in the district court (C-75-190) against Ford Motor and Ford Credit claiming violations of the Sherman Act and violations of the Automobile Dealer's Franchise Act. Ford Credit counterclaimed against Colonial for all indebtedness owed by Colonial to Ford Credit including acceleration of the mortgage loan in the amount of $1,000,000. Colonial moved for a preliminary injunction to prevent Ford Credit from taking any action to foreclose on any of the security interests, including the Loan Security Agreement and related trust deed. An injunction was entered in August 1975 which specifically "enjoined and restrained [Ford Credit] from taking any action to foreclose its deed of

trust on [Colonial's] real property except such action as may be reasonably necessary to protect the priority of its interest in plaintiff's real property."

On June 24, 1976, a jury returned a verdict in favor of Ford Credit on all of Colonial's claims. On July 7, 1976 Ford Credit moved to dissolve the preliminary injunction and for entry of judgment on its counterclaim and for an entry of an order of foreclosure. On October 29, 1976, the court entered its final judgment and order on Ford Credit's counterclaim in the amount of $2,897,125.22 which represented all of the indebtedness owed by Colonial to Ford Credit. Colonial was awarded judgment against Ford Motor Company in the amount of $210,000. The court again restrained Ford Credit from foreclosing on the real property securing the Capital Loan Security Agreement and the trust deed or the furniture and fixtures or the accounts receivable. The court further restrained Ford Credit from executing upon Colonial's assets for collection of the accelerated amounts of the judgment and continued the preliminary injunction issued by it in August 1975 during the pendency of the appeal.

Following entry of the judgment in favor of Ford Credit against Colonial, Ford Credit filed a form of garnishment affidavit and had the clerk of the Federal District Court issue a writ of garnishment on November 23, 1976. The writ identified Ford Motor as the garnishee. On January 25, 1977 Ford Motor filed answers to the garnishment interrogatories, stating it was indebted to Colonial in the amount of $91,504.90 and, by virtue of a judgment entered in *Colonial Ford, Inc. v. Ford Motor Company, et. al* (C-75-190), in the amount of $210,000 plus interests and costs. On March 10, 1977 a garnishee judgment was entered against Ford Motor in favor of Ford Credit. The garnishee judgment was subsequently amended twice. On February 1, 1978 Ford Motor delivered $85,042.72 to Ford Credit in connection with the garnishment proceedings. Ford Credit has subsequently received additional amounts from Ford Motor in connection with the garnishment.

About January 1976, while C-75-190 was still pending, Colonial applied for a capital loan from Zions First National Bank to be guaranteed by the Small Business Administration, the plaintiff in

action C-78-256. That loan was closed May 11, 1976. At the time the loan was made, Zions and the SBA knew that the subject property was secured by a first deed of trust in favor of Ford Credit and that the SBA's lien position would be junior to Ford Credit's first deed of trust. Zions and the SBA also knew of the pending litigation between Ford Credit and Colonial and that Ford Credit had counterclaimed to foreclose its deed of trust in that litigation.

On June 16, 1978, the United States, on behalf of the SBA, filed action C-78-256 to foreclose on the deed of trust on Colonial's property. That deed of trust was recorded on August 6, 1976. As part of that action, the United States name as defendants all claimed lienholders of the subject property. Ford Credit was named as a defendant because of its first deed of trust executed by Colonial in favor of Ford Credit and recorded on February 14, 1974. On October 19, 1978, the court entered an order consolidating the United States foreclosure action with the pending foreclosure action in C-75-190, *Colonial Ford v. Ford Motor, et. al.*

Petty Motor's claims against Colonial arise from a state court judgment of $150.00 docketed February 15, 1977, and a later judgment docketed on October 20, 1977 in the amount of $353,968.17, $6,000.00 attorney's fees, $88.00 costs, and interest thereon.

III. THE QUESTION OF PRIORITY

The United States and Petty Motor essentially contend they should be moved ahead of Ford Credit in priority because Ford Credit "elected" to enforce a personal judgment lien rather than the Ford Credit Deed of trust and must, therefore, base its lien position on the date its judgment lien was docketed, rather than upon the recording date of its deed of trust.

Both the United States and Petty Motor recognize that Ford Credit attempted to foreclose on its mortgage but because the deed of trust was unenforceable due to the district court's imposition of an injunction at Colonial's request, Ford Credit was restrained from obtaining a judgment in foreclosure. They now argue that because

Ford Credit was awarded what appears to be a personal or money judgment against Colonial and because Ford Credit even attempt ed to execute thereon, Utah's "one-action rule" § 78-37-1, Utah Code Ann. (1953), effectuates a waiver by Ford Credit of its security, requiring Ford Credit to look only to its judgment to enforce its claim against the real estate.

The United States and Petty Motor contend that Ford Credit was able to skirt the strict requirement of the one-action rule (that recovery on a debt secured solely by mortgage upon real estate must be preceded by foreclosure) by either of two recognized exceptions to the rule, namely, waiver or impairment of security. Thus, it is argued, Ford Credit, even though it attempted to foreclose on its mortgage, failed to obtain a judgment in foreclosure because the security's value was impaired or the one-action rule was waived. By meeting an exception to the one-action rule, the argument continues, Ford Credit was able to obtain a personal judgment, made an election of its remedies, as evidenced by its execution in the form of a garnishment, and has waived its interest in the land except as its personal judgment may attach thereto.

IV. APPLICATION OF THE ONE-ACTION RULE

After a careful look at Utah's one-action rule, its history and purposes, this court concludes the rule is not applicable to the present situation. Several reasons support this conclusion. First, Ford Credit elected foreclosure rather than a personal judgment, and it can be assumed that Ford Credit would have obtained a judgment of foreclosure if Colonial, the debtor, had not requested and the court granted the preliminary injunction staying foreclosure pending appeal.

Second, this conclusion fulfills the policy of the one-action rule. As the Utah Supreme Court explains,

> The purpose of the statute was to eliminate harassment of debtors and multiple litigation which sometimes occurred under the common-law rule which allowed a creditor to foreclose and sell the land, and to sue on the note. The

> statute limits the creditor to one remedy in exhausting his security before having resource to the debtor for a deficiency.

Utah Mortgage and Loan Co. v. Black, 618 P.2d 43, 45 (Utah 1980). In this case, it is evident the debtor was protected from harassment and multiple litigation—everything was done (and still is being done) under court supervision and the debtor has had full opportunity to voice its concerns.

Third, it does not appear that the court, by restraining Ford Credit from foreclosure pending appeal, intended to disturb the priority among the parties. The court specifically allowed Ford Credit to take "such action as may be reasonably necessary to protect the priority of its interest in [Colonial's] real property."

Finally, even the ability of Ford Credit to execute on the October 1976 judgment was subject to court approval and was limited to a small portion of the entire judgment. Colonial was severely limited on what it could realize upon. As the district court declared:

> Ford Credit be and it hereby is restrained from foreclosing upon the real property securing the Capital Loan Security Agreement or the furniture and fixtures or the accounts receivable and is restrained from execution upon plaintiff's assets for collection of the accelerated amount of this judgment pending determination of the case on appeal, and provided further that defendant Ford Credit be, and it hereby is, entitled to proceed to collect by execution or otherwise the past due amount of this judgment consisting of the amount past due at the time of trial . . . and the amount currently past due . . . unless execution is stayed upon the filing [of] a supersedeas bond in that amount.

As a result, this court must conclude the one-action rule is not applicable to this present situation where the creditor consistently sought foreclosure but was temporarily prevented from obtaining a judgment of foreclosure because of an injunction, and that the priority of the parties was not disturbed by the district court's October 1976 Judgment and Order.

Accordingly, Ford Credit's motion for summary judgment as to priority is granted. The motions for summary judgment of the

United States and Petty Motor are denied. Paragraph four of this court's October 13, 1982 Decree is hereby amended to read: "4. The priority among Ford Motor Credit Company, the United States of America and Petty Motor Company is as follows: first, Ford Motor Credit Company; second, the United States of America; and third, Petty Motor Company."

Dated this 7th day of December 1982.

/s/

David K. Winder
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
COLONIAL FORD,
INCORPORATED,
et al,
Defendants.

ORDER OF SALE
Civil No. C-78-0256W

COLONIAL FORD, INC.,
Plaintiff,
vs.
FORD MOTOR CREDIT
COMPANY,
Defendant.

Civil No. C-75-190W

COLONIAL FORD, INC.,
Plaintiff,
vs.
FORD MOTOR COMPANY and
FORD MOTOR CREDIT COMPANY,
Defendants.

Civil No: C-79-0364

THE UNITED STATES OF AMERICA:

TO THE UNITED STATES MARSHAL, GREETINGS:

WHEREAS, on July 23, 1981, Ford Motor Credit Company, The United States of America, and Petty Motor Company obtained an Order and Judgment in the United States District Court for the District of Utah, Central Division, against Colonial Ford, Inc.; and

WHEREAS, on October 13, 1982, a Decree was entered in the United States District Court for the District of Utah, Central Division; and

WHEREAS, said Decree was amended by a Memorandum Decision and Order dated December 7, 1982;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the land and premises mentioned and described in the said Order and Judgment and Decree be sold at public auction, as in said Order and Judgment, Decree, and Memorandum Decision and Order particularly set out.

NOW, THEREFORE, you, the said United States Marshal are hereby commanded and required to proceed to notice for sale and to sell the premises described in the said Order and Judgment and Decree, copies of which are hereunto annexed and made a part hereof, and apply the proceeds of said sale as in said Order and Judgment, Decree, and Memorandum Decision and Order directed, and to make and file your report of such sale with the clerk of this Court within sixty (60) days of the date of your receipt hereof, and to do all things according to the terms and requirements of said Order and Judgment, Decree, and Memorandum Decision and Order and the provisions of the statutes in such cases made and provided.

WITNESS, the Honorable Judges of the United States District Court for the District of Utah, this 24th day of January, 1983.

PAUL W. BADGER, CLERK

By /s/
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—August 13, 1985

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, and Honorable John P. Moore, Circuit Judges

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. COLONIAL FORD, INC., et al Defendants, PETTY MOTOR COMPANY, Defendant-Appellee.	)	No. 83-1724

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellee in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By Robert L. Hoecker
Chief Deputy Clerk

APPENDIX G

28 U.S.C. § 1921 (1982)

UNITED STATES MARSHAL'S FEES

Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:

For serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, capias or any other writ, order, or process in any case or proceeding, except as otherwise provided, $3;

For serving a subpoena or summons for a witness or appraiser, $2;

For forwarding any writ, order, or process to another judicial district for service, in addition to the prescribed fee, $1;

For the prepraration of any notice of sale, proclamation in admiralty, or other public notice or bill of sale, $3;

For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receive and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1½ per centum on the excess of any sum over $1,000. If not disposed of by marshal's sale, the commission shall be in such amount as may be allowed by the court. In all cases in which the vessel or other property is sold by a public auctioneer, or by some party other than the marshal or his deputy, the commission herein authorized to be paid to the marshal shall be reduced by the amount paid to said auctioneer or other party;

For the keeping of property attached (including boats, vessels, or other property attached or libeled) actual expenses incurred, such as storage, moving boat hire, or other special transportation, watchmen's or keeper fees, insurance, and $3 per hour for each deputy marshal required for special services, such as guarding, inventorying, moving, and so forth. The marshals shall collect, in advance, a deposit to cover the initial expenses for such services and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded;

For copies of writs or other papers furnished at the request of any party, 30 cents per folio of one hundred words or fraction thereof;

For all services in a criminal case except for the summoning of witnesses, a sum to be fixed by the court not exceeding $25 where conviction is for a misdemeanor and not exceeding $100 where conviction is for a felony;

For necessary travel in serving or endeavoring to serve any process, writ, or order, 12 cents per mile, or fraction thereof, to be computed from the place where service is returnable to the place of service or endeavor; or, where two or more services or endeavors, or where an endeavor and a service, are made in behalf of the same party in the same case on the same trip, mileage shall be computed to the place of service or endeavor which is most remote from the place where service is returnable, adding thereto any additional mileage traveled in serving or endeavoring to serve in behalf of that party. When two or more writs of any kind, required to be served in behalf of the same party, on the same person, in the same case or proceeding, may be served at the same time, mileage on only one such writ shall be collected;

No mileage fees shall be collected for services or endeavors to serve in the District of Columbia;

The marshal may require a deposit to cover all fees and expenses herein prescribed.

APPENDIX H
28 U.S.C. § 2001 (1982)

SALE OF REALTY GENERALLY

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court,

which guarantees at least a 10 per centum increase over the price offered in the private sale.

(c) This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

APPENDIX I
FED. R.CIV.P. 69

EXECUTION

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his sucessor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C. § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2 § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

APPENDIX J
UTAH R. CIV. P. 69

EXECUTION AND PROCEEDINGS SUPPLEMENTAL THERETO

(a) **Issuance of Writ of Execution.** Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs, which may issue at any time within eight years after the entry of judgment, (except an execution may be stayed pursuant to Rule 62) either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. Notwithstanding the death of a party after judgment execution thereon may be issued, or such judgment may be enforced, as follows:

(1) In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon.

(b) **Contents of Writ and to Whom it May be Directed.** The writ of execution must be issued in the name of the state of Utah, sealed with the seal of the court and subscribed by the clerk. It may be issued to the sheriff of any county in the state (and may be issued at the same time to different counties) but where it requires the delivery of possession or sale of real property, it must be issued to the sheriff of the county where the property or some part thereof is situated. If it requires delivery of possession or sale of personal property, it may be issued to a constable. It must intelligibly refer to the judgment, stating the court, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for money, the amount thereof, and the amount actually due thereon. It shall be directed to the sheriff of the county in which it is to be executed in cases involving real property, and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment

debtor generally it may direct the constable to satisfy the judgment, with interest, out of the perosnal proeprty of the debtor, and if sufficient personal property cannot be found, then the sheriff shall satisfy the judgment, with interest, out of his real property.

If the judgment requires the sale of property, the writ of execution shall recite such judgment, or the material parts thereof, and direct the officer to execute the judgment by making the sale and applying the proceeds in conformity therewith. The judgment creditor may require a certified copy of the judgment to be served with the execution upon the party against whom the judgment was rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

(c) **When Writ to be Returned.** The writ of execution shall be made returnable at any time within two months after its receipt by the officer. It shall be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(d) **Service of the Writ.** Unless the execution otherwise directs, the officer must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient; collecting or selling the choses in action and selling the other property, and paying to the judgment creditor or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has begun to serve an execution issued out of any court on or before the return day of such execution, he may complete the service and return thereof after such return day. If he shall have begun to serve an execution, and shall die or be incapable of completing the service and return thereof, the same may be completed by any other officer who might by law execute the same if delivered to him; and if the first officer shall not have made a

certificate of his doings, the second officer shall certify whatever he shall find to have been done by the first, and shall add thereto a certificate of his own doings in completing the service.

(e) **Proceedings on Sale of Property.**

(1) Notice. Before the sale of the property on execution notice thereof must be given as follows: (1) In case of perishable property, by posting written notice of the time and place of sale in three public places of the precinct or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property. (2) In case of other personal property, by posting a similar notice in at least three public places of the precinct or city where the sale is to take place, for not less than seven nor more than fourteen days. (3) In case of real property, by posting a similar notice, particulary describing the property, for 21 days, on the property to be sold, at the place of sale, and also in at least three public places of the precinct or city where the property to be sold is situated, and publishing a copy thereof at least three times, once a week for three successive weeks immediately preceding the sale, in some newspaper published in the county, if there is one.

(2) Postponement. If at the time appointed for the sale of any real or personal property on execution the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the same from time to time, until the same shall be completed; and in every such case he shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement is for a longer time than one day, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

(3) Conduct of Sale. All sales of property under execution must be made at auction to the highest bidder, between the hours of 9 o'clock a.m. and 5 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor his deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view

of those who attend the sale, and it must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions.

(4) Purchaser Refusing to Pay. Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in his discretion, thereafter reject any other bid of such person.

(5) Personal Property. When the purchaser of any personal property pays the purchase money, the officer making the sale shall deliver the property to the purchaser (if such property is capable of manual delivery) and shall execute and deliver to him a certificate of sale and payment. Such certificate shall state that all right, title and interest which the debtor had in and to such property on the day the execution or attachment was levied, and any right, title and interest since acquired, is transferred to the purchaser.

(6) Real Property. Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: (1) a particular description of the real property sold; (2) the price paid by him for each lot or parcel if sold separately; (3) the whole price paid; (4) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser; provided that where such sale is subject to redemption that fact shall

be stated also. A duplicate of such certificate shall be filed for record by the officer in the office of the recorder of the county. The real property sold shall be subject to redemption, except where the estate sold is less than a leasehold of a two-years' unexpired term, in which event said sale is absolute.

(f) **Redemption from Sale.**

(1) Who May Redeem. Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (1) The judgment debtor; (2) a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

(2) Redemption—How Made. At the time of redemption the person seeking the same may make payment of the amount required to the person from whom the property is being redeemed, or for him to the officer who made the sale, or his successor in office. At the same time the redemptioner must produce to the officer or person from whom he seeks to redeem, and serve with his notice to the officer: (1) a certified copy of the docket of the judgment under which he claims the right to redeem, or, if he redeems upon a mortgage or other lien, a memorandum of the record thereof certified by the recorder; (2) an assignment, properly acknowledged or proved where the same is necessary to establish his claim; (3) an affidavit by himself or his agent showing the amount then actually due on the lien.

(3) Time for Redemption, Amount to be Paid. The property may be redeemed from the purchaser within six months after the sale on paying the amount of his purchase with 6 per cent thereon in addition, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property which the purchaser may have paid thereon after the purchase, with interest on such amounts, and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which said purchase was made, the amount of such lien, with interest.

In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper, the person seeking redemption may pay the amount necessary for redemption, less the amount in dispute, to the court out of which execution or order authorizing the sale was issued, and at the same time file with the court a petition setting forth the item or items demanded to which he objects, together with his grounds of objection; and thereupon the court shall enter an order fixing a time for hearing of such objections. A copy of the petition and order fixing time for hearing shall be served on the purchaser not less than two days before the day of hearing. Upon the hearing of the objections the court shall enter an order determining the amount required for redemption. In the event an additional amount to that theretofore paid to the clerk is required, the person seeking redemption shall pay to the clerk such additional amount within 7 days. The purchaser shall forthwith execute and deliver a proper certificate of redemption upon being paid the amount required by the court for redemption.

(4) Subsequent Redemptions. If the property is redeemed by a creditor, any other creditor having a right of redemption may, within 60 days after the last redemption and within six months after the sale, redeem the property from such last redemptioner in the same manner as provided in the preceding subdivision, upon paying the sum of such last redemption, with three per cent thereon in addition and the amount of any assessment or tax, and any reasonable sum for fire insurance and necessary maintenance, upkeep or repair of any improvements upon the property which the last redemptioner may have paid thereon, with interest on such amount, and, in addition, the amount of any lien held by such last redemption prior to his own, with interest. Written notice of any redemption shall be given to the officer and a duplicate filed with the recorder of the county. Similar notice shall be given of any taxes or assessments or any sums for fire insurance, and necessary maintenance, upkeep or repair of any improvements upon the property, paid by the person redeeming, or the amount of any lien acquired, other than upon which the redemption was made. Failure to file such notice shall relieve any subsequent redemptioner of the obligation to pay such taxes, assessments, and other liens.

(5) Where no Redemption is Made. If no redemption is made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed and no other redemption by a creditor has been made and notice thereof has been given, the last redemptioner, or his assignee, is entitled to a sheriff's deed at the expiration of six months after the sale. If the judgment debtor redeems, he must make the same payments as are required to effect a redemption by a creditor. If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, duly acknowledged. Such certificate must be filed and recorded in the office of the county recorder where the property is situated.

(6) Rents during Period of Redemption. The purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may, within sixty days after such demand, bring an action to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action the right of redemption is extended to such redemptioner or debtor.

(g) **Remedies of Purchaser.**

(1) For Waste. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, upon motion, with or without notice, of the purchaser, or his successor in interest. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon or to use wood or timber on the property therefor, or for the repair of fences, or for fuel for his family while he occupies the property. After his estate has become absolute, the purchaser or his successor in interest may maintain an action to recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

(2) Where Purchaser Fails to Obtain Possession of Property or is Dispossessed Thereof or Evicted Therefrom. Where, because of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, or because of the reversal or discharge of the judgment, a purchaser of property sold on execution, or his successor in interest, fails to obtain the property or is dispossessed thereof or evicted therefrom, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment creditor as the court may prescribe, enter judgment against such judgment creditor for the price paid by the purchaser, together with interest. In the alternative, if such purchaser or his successor in interest, fails to recover possession of any property or is dispossessed thereof or evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment debtor as the court may prescribe, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment

bore; and the judgment so revived shall have the same force and effect as would an original judgment of the date of the revival.

(h) **Contribution and Reimbursement; How Enforced.** When upon an execution against several persons more than a prorata part of the judgment is satisfied out of the proceeds of the sale of the property of one, or one of them pays, without a sale, more than his proportion, and the right of contribution exists, he may compel such contribution from the others; and where a judgment against several is upon an obligation of one or more as security for the others, and the surety has paid the amount or any part thereof, by sale of property or otherwise, he may require reimbursement from the principal. The person entitled to contribution or reimbursement shall, within one month after payment, or sale of his property in the event there is a sale, file in the court where the judgment was rendered a notice of such payment and his claim for contribution or reimbursement. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket which shall have the effect of a judgment against the other judgment debtors to the extent of their liability for contribution or reimbursement.

(i) **Payment of Judgment by Person Indebted to Judgment Debtor.** After the issuance of an execution and before its return, any person indebted to the judgment debtor may pay to the officer the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the officer's receipt is a sufficient discharge for the amount paid.

(j) **Where Property is Claimed by Third Person.** If an officer shall proceed to levy any execution on any goods or chattels claimed by any person other than the defendant, or should he be requested by the judgment creditor so to do, such officer may require the judgment creditor to give an undertaking, with good and sufficient sureties, to pay all costs and damages that he may sustain by reason of the detention or sale of such property; and until such undertaking is given, the officer may refuse to proceed against such property.

(k) **Order for Appearance of Judgment Debtor; Arrest.** At any time when execution may issue on a judgment, the court from

an execution might issue shall, upon written motion of the judgment creditor, with or without notice as the court may determine, issue an order requiring the judgment debtor, or if a corporation, any officer thereof, to appear before the court or a master at a specified time and place to answer concerning his or its property. A judgment debtor, or if a coproration, any officer thereof, may be required to attend outside the country in which he resides, but the court may make such order as to mileage and expenses as is just. The order may also restrain the judgment debtor from disposing of any nonexempt property pending the hearing. Upon the hearing such proceedings may be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as on execution against such property.

In aid of an order requiring the attendance of the judgment debtor the court may, upon satisfactory proof by affidavit or otherwise, that there is danger of the debtor's absconding, order the sheriff to arrest the debtor and bring him before the court, and may order such judgment debtor to enter into an undertaking with sufficient sureties, that he will attend from time to time before the court or master, as may be directed during the pendency of the proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to jail.

(l) **Examination of Debtor of Judgment Debtor.** At any time when execution may issue on a judgment, upon proof by affidavit or otherwise to the satisfaction of the court that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding fifty dollars, not exempt from execution, the court may order such person or corporation or any officer or agent thereof, to appear before the court or a master at a specified time and place to answer concerning the same. Witness fees and mileage, if any, may be awarded by the court.

(m) **Order Prohibiting Transfer of Property.** If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to him in an amount exceeding fifty dollars,

not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(n) **Witnesses.** Witnesses may be required to appear and testify in any proceedings brought under subdividions (k) and (l) of this Rule in the same manner as upon the trial of an issue.

(o) **Order for Property to Be Applied on Judgment.** The court or master may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(p) **Appointment of Receiver.** The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of his appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DIVISION OF UTAH

United States of America,

Plaintiff,

CIVIL NO. C-78-0256

vs.

COMPLAINT

Colonial Ford, Incorporated; LeGrande L. Belnap, Doris W. Belnap; Ford Motor Credit Company; Victor Construction Co., Inc.; W. Heath & Co., Inc.; Walker Bank & Trust Co.; Utah State Tax Commission; Crus Distribution Co., Inc.; Utah State Industrial Commission; Commercial Security Bank; First Security Bank; Patricia McPhie; Charles B. Petty dba Petty Motor Company; Alma Piston Corp. dba Genuine Parts Distributors; Reynolds & Reynolds Co.; Terminal Service Co.; Richard Hicks and Marilyn Hicks, husband and wife; Michael Wendorf; Centennial Motors; J. M. Freedman; Nancy J. Freedman; Vernon James Smith; Tony Bova and Bova Investment Co.; Service Incorporated; Hal B. Heiner dba Heiner Garage; Newspaper Agency Corp.; Joann McGrath; Dealer Method Service dba A.R.A. of Salt Lake; Apache Tire Center dba R&M Big O Tire; B. K. Supply, Inc.; Clyde W. Ferguson; Nord Advertising; Christine "Tina" Campbell, aka Christine Brewer, Walker Bank & Trust Co., executor of the estate of Utahna P. Belnap, Neuman C. Petty, Rachel P. Lunt, Norma P. Straser, Leila P. Schipp, Wayne G. Petty, trustee of the Larry V. Lunt Trust and Robert P. Lunt Trust dba Petty Motor Company, a Partnership; National Advertising Co.; A-1 Quality Glass, Inc.; KRGO Radio; KUTV, TV Station; Searchlight Advertising; KCPX Radio, KRSP Radio, KSOP Radio; KAYK Radio, KTVX, TV Station; KSSX Radio; FORD MOTOR COMPANY,

Defendants

(2)

No. 85-798

Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

PETTY MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1 APP

QUESTION PRESENTED

Whether the provisions of 28 U.S.C. 1921, governing the assessment of fees of United States marshals for conducting foreclosure sales, are to be interpreted according to state or federal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-26) is reported at 767 F.2d 712. The order of the district court (Pet. App. 27-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1985, and a petition for rehearing was denied on August 13, 1985 (Pet. App. 43). The petition for a writ of certiorari was filed on November 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Petty Motor Company challenges payment of a marshals fee under 28 U.S.C. 1921 on real property it purchased in a judicial foreclosure sale conducted by the United States Marshals Service. The sale resulted from

mortgage foreclosure proceedings brought by the Small Business Administration against Colonial Ford in the United States District Court for the District of Utah.[1] On September 29, 1982, the district court ordered that the subject property "be sold at public auction by the United States Marshal in the manner prescribed by law for such sale" (Pet. App. 31). The marshal advertised and conducted the sale in accordance with Utah law, since the court did not specify what law was to be applied. Petitioner, by agreement of the interested parties, purchased the mortgaged property using a credit bid of $1,361,531.50, equal to the amount of indebtedness. Petitioner submitted $20,427.94 as payment for the marshals fee, but also filed a motion requesting the district court to determine the proper marshals fee payable under 28 U.S.C. 1921. The marshal is entitled under Section 1921 to a percentage of the sale proceeds as a commission if three acts are performed: (1) the seizing or levying of property; (2) the disposition of the property by sale, setoff or otherwise; and (3) the receiving and paying over of money.[2]

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[1]The SBA's foreclosure action, which was filed on June 16, 1978, was consolidated with a pending foreclosure action brought against Colonial Ford by Ford Motor Credit Company (Pet. App. 27). Although Ford Motor Credit Company was listed by the district court as being the priority lienholder, followed by the United States and then petitioner (*id.* at 40), petitioner is the assignee of the judgment of Ford Motor Credit Company and acquired its priority lien rights.

[2]28 U.S.C. 1921 provides in pertinent part:

> Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:
>
> * * * * *
>
> For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1 ½ per centum on the excess of any sum over $1,000.

2. The district disallowed the statutory marshals fee on the ground that "there was no 'receiving and paying over money' " (Pet. App. 28) as required by 28 U.S.C. 1921. The court assessed only the actual costs of the sale, approximately $211, against petitioner (Pet. App. 27-28).

The court of appeals reversed (Pet. App. 21-26). It held that the credit bid represented a "constructive transfer of funds" in satisfaction of the "receiving and paying over money" requirement of the statute (*id.* at 25). The court also rejected petitioner's argument that Fed. R. Civ. P. 69(a) requires that the terms of 28 U.S.C. 1921 be interpreted by applying state law.[3] Specifically, petitioner claimed that the marshal did not satisfy the prerequisite that there be a "levy" or "seizure" because under Utah law a judicial sale requires neither a levy nor a seizure. The court reaffirmed its decision in *Hill* v. *Whitlock Oil Services, Inc.*, 450 F.2d 170 (10th Cir. 1971), that 28 U.S.C. 1921 is to be interpreted by applying federal law. The court in *Hill* defined "levy" as meaning " 'to take control of * * * property' " (450 F.2d at 174). The court noted that in a judicial sale, the marshal takes "control of the land under a court order to hold a foreclosure sale for the satisfaction of a judgment" and "in effect levie[s] on the land" (*ibid.*). Applying *Hill* in the instant case, the court held that Rule 69(a) was not applicable, and judicial sales involve a "levy" for purposes of 28 U.S.C. 1921 (Pet. App. 25).

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[3]Rule 69(a) provides in pertinent part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceeding on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

ARGUMENT

Petitioner correctly notes that there is a conflict over whether state law is to be applied in defining the terms used in 28 U.S.C. 1921. Three circuits have applied Fed. R. Civ. P. 69(a) and state law to deny recovery of a marshals fee under 28 U.S.C. 1921 for a judicial sale. *Travelers Insurance Co.* v. *Lawrence,* 509 F.2d 83 (9th Cir. 1974); *James T. Barnes & Co.* v. *United States,* 593 F.2d 352 (8th Cir. 1979); *Federal Land Bank* v. *Hassler,* 595 F.2d 356 (6th Cir. 1979). Although we submit that the result reached by the court below, reaffirming its prior position in *Hill* v. *Whitlock Oil Services, Inc., supra,* is clearly correct,[4] we did not seek review of the contrary decisions because we did not believe that the conflict was of sufficient importance to merit this Court's review. We are still of that view.

1. a. Petitioner contends (Pet. 9-11) that the marshal is not entitled to the statutory fee because a judicial sale, unlike an execution sale, does not involve a "levy" or

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[4]Petitioner erroneously suggests (Pet. 11) that the decision below is inconsistent with *Hill.* The Tenth Circuit here and in *Hill* held that for purposes of 28 U.S.C. 1921 judicial sales, like execution sales, constitute a levy. The fact that the court of appeals in the present case recognized the legal distinction between a judicial sale and an execution sale (Pet. App. 25) scarcely creates a conflict with *Hill.*

Petitioner also contends (Pet. 12) that the decision below is inconsistent with *International Paper Co.* v. *Whitson,* 595 F.2d 559 (10th Cir. 1979). Again, petitioner's claim lacks merit. In *International Paper Co.* the court, applying Rule 69(a), held that the Department of Housing and Urban Development could not obtain a deficiency judgment after foreclosure on a mortgage because it failed to comply with the state's procedure for entry of a deficiency judgment. In this case, however, the focus is not on procedure, but rather on what Congress meant by the terms "levy" and "seizure" in 28 U.S.C. 1921.

In all events, to the extent there is any inconsistency in the Tenth Circuit's decisions, it is for that court to resolve.

"seizure" of property within 28 U.S.C. 1921.[5] Neither term is defined in Section 1921. Therefore, as the court stated in *Hill*, "[t]he controlling consideration * * * is legislative intent." 450 F. 2d at 173. Nothing in the legislative history of 28 U.S.C. 1921 suggests that Congress intended marshals to conduct judicial sales without the statutory compensation. Indeed, the legislative history suggests otherwise.[6] In 1962 Congress amended 28 U.S.C. 1921 to provide a percentage formula for the calculation of marshals fees in order to achieve uniformity by eliminating the prior practice in which marshals fees varied from state to state. H. R. Rep. 1724, 87th Cong., 2d Sess. 2, 5 (1962). The uniform fee schedule was also designed to "increase the fees charged to private litigants for the services of U.S. marshals" (*id.* at 2).

To prevent marshals from obtaining the statutory fee for judicial sales, depending on the vagaries of state law, would resurrect the disuniformity that Congress sought to eliminate in enacting 28 U.S.C. 1921 and result in private litigants receiving a substantial federal service for a nominal

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[5]As the court of appeals explained (Pet. App. 25, quoting *Yazoo & M.V.R. R.* v. *Clarksdale*, 257 U.S. 10, 19 (1921)), a judicial sale "is within the control of the court because the court sets the standards (procedure) under which the sale will be conducted," whereas an execution sale " 'issue[s] by mere praecipe of the judgment creditor * * * and only come[s] under judicial supervision on complaint of either party.' "

[6]Judge Sneed, dissenting in *Travelers Insurance Co.* v. *Lawrence*, 509 F.2d at 90-95, pointed out that although the "seizing or levying on property" language had been in the predecessor of Section 1921 since 1853, there was no suggestion that either the original or the amended statute excluded judicial sales. Indeed, given the wide variations among the state laws in this area, Judge Sneed suggested that Congress could not practically have defined with greater specificity the types of mortgage foreclosures to be covered: the language incorporated into Section 1921 "is general in scope and * * * has proved elastic enough to embrace mortgage foreclosures under the procedures of each of the states for more than a century." 509 F.2d at 93.

fee—or even no fee at all.[7] That is certainly not what Congress intended. In addition, since the marshal must undertake essentially the same effort for a judicial sale as for an execution sale, there is simply no rationale that would justify reading the words "levy" or "seizure" to exclude judicial sales.

b. Petitioner nevertheless argues that Fed. R. Civ. P. 69(a) requires that reading in this case. Petitioner contends that Rule 69(a) directs the federal courts to look to state law to define the terms "levy" and "seizure" in Section 1921, and to determine whether the marshal is entitled to the statutory fee. No such fee is due here, petitioner asserts, because under Utah law, neither a levy nor a seizure occurs in a judicial sale. Assuming arguendo that petitioner's interpretation of state law is correct, this argument must nevertheless be rejected. As noted above, reliance on state law for the definition of the terms in Section 1921 is inconsistent with the aim of uniformity underlying enactment of that Section. H. R. Rep. 1724, *supra,* at 5. As the court stated in *Hill,* 450 F.2d at 174:

> The attainment of uniformity requires not only the same rate, but the same method of assessment. The commission should be allowed or denied for substantially the same services in whatever jurisdiction they may be rendered. Uniformity is impossible if the right of the Marshal depends on the fine distinctions which state law may draw.

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[7]Since 28 U.S.C. 1921 is phrased in mandatory terms, at least one court has concluded that the Section does not permit the award of any fee if the prerequisites for the award of the statutory fee are not satisfied. *Federal Land Bank* v. *Hassler,* 595 F.2d at 358-359. Cf. *Transamerica ICS, Inc.* v. *M/V Hellenic Sun,* No. 84-2220 (4th Cir. Dec. 2, 1985) (district court has no authority to modify marshals fee prescribed by 28 U.S.C. 1921).

See also *Transamerica ICS, Inc.* v. *M/V Hellenic Sun*, No. 84-2220 (4th Cir. Dec. 2, 1985), slip op. 6 ("Section 1921 is intended to provide a uniform method of computing those commissions").[8]

Moreover, Rule 69(a) is inapplicable by its own terms. It applies to process for the execution of a money judgment and in aid of such execution. "A judicial foreclosure by nature falls outside the realm of post-judgment satisfaction" (Pet. App. 24). And, in any event, the Rule itself provides for the application of state law "except that any statute of the United States governs to the extent that it is applicable." The advisory committee notes to Rule 69 (Fed. R. Civ. P.) identify 28 U.S.C. (1954 ed.) 574, the predecessor of Section 1921, as one of the federal statutes that is within this exception. Section 1921 obviously enjoys the same status.

c. Petitioner finally contends (Pet. 13) that state law is applicable to 28 U.S.C. 1921 by virtue of 28 U.S.C. 2001(a), which provides that real estate sold under a court order "shall be sold * * * upon such terms and conditions as the court directs." Section 2001(a) applies to judicial sales. *Yazoo & M. V. R. R.* v. *Clarksdale*, 257 U.S. 10, 18-19 (1921). The district court here directed that the sale be conducted in " 'the manner prescribed by law,' " and the marshal in fact followed state law procedures in conducting the sale. But it simply does not follow that the marshals fee was also to be established by state law. Instead, as we have shown, the enactment of 28 U.S.C. 1921 was intended to avoid that result and to create a nationally uniform fee system.[9]

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[8]Petitioner's construction of 28 U.S.C. 1921 also leads to a distinction, not contemplated by the statute, between seizures in admiralty and other actions. See *Coast Engine & Equipment Corp.* v. *Sea Harvester, Inc.*, 641 F.2d 723, 727 (9th Cir. 1981).

[9]Petitioner makes the same arguments based on Fed. R. Civ. P. 69(a) and 28 U.S.C. 2001 in contending that the marshal did not satisfy the

2. Although we accordingly believe that the court of appeals correctly applied 28 U.S.C. 1921 in this case, we have not asked this Court to review the cases in other circuits that reach a different result in conflict with the Tenth Circuit's original pronouncement on this matter in *Hill* v. *Whitlock Oil Services, Inc., supra.* The issue is no more worthy of review in this case.

The disagreement is simply over the method of calculating the fees due the Marshals Service in a narrow category of cases. As the paucity of reported cases indicates, this issue does not arise frequently. Moreover, while the amounts involved can be substantial when the judicial foreclosure sale involves valuable property,[10] and uncertainty over the fees recoverable can lead to unnecessary litigation, the disagreement has not seriously hampered the operations of the Marshals Service or affected the use of marshals to conduct judicial sales.

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requirement of 28 U.S.C. 1921 that he "receiv[e] and pay[ ]over money." Petitioner asserts that under state law, no commission is earned unless "money changes hands," and a credit bid does not satisfy that requirement. For the reasons stated above, state law is not controlling. Nor is it persuasive. As the court of appeals concluded, the credit bid was "a constructive transfer of funds" (Pet. App. 25). Accepting petitioner's argument would "ignore[ ] the reality and the economic effect * * * of the credit transaction and thereby frustrate[ ] the intent of Congress that private parties pay the cost of the services rendered to them by the government" (*ibid.*).

[10]For example, the district court awarded only $211.14 in marshals fees here, while the statutory fee under Section 1921 amounted to $20,427.94. This disparity is due to the fact that the statutory fee is a percentage of the value of the property involved, with no cap. Although the percentage formula may result in large fees where, as here, the property involved is valuable, because the formula has no floor it also yields small fees where the property is of only moderate value. Congress evidently concluded that this method of calculating fees, while it may be imprecise in any particular case, best accommodates the interests of private litigants as a whole with the need to raise revenues to reimburse the Marshals Service for services provided.

The dispute over the appropriate amount of marshals fees in judicial sales is essentially a policy question best resolved in Congress. To that end, the Department of Justice has determined to seek clarifying legislation and, in December 1985, submitted to Congress a legislative proposal entitled the "United States Marshals Service Act of 1985." See H.R. 3870, 99th Cong., 1st Sess. This proposal includes an amendment to 28 U.S.C. 1921, specifically making it applicable to "judicially ordered sales and execution sales, without regard to whether the judicial order or sale constitutes a seizure or levy within the meaning of State law" (H.R. 3870, *supra,* at 11).[11] The pendency of this proposed amendment makes review of the legal issue raised by petitioner particularly inappropriate at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1986

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[11]The proposed legislation also authorizes the Attorney General to "prescribe * * * regulations which establish a minimum and maximum amount for the commission collected under" Section 1921 (H.R. 3870, *supra*, at 12).

SUPREME COURT OF THE UNITED STATES

PETTY MOTOR COMPANY *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 85–798. Decided March 3, 1986

The petition for writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

In this case the United States Court of Appeals for the Tenth Circuit held that as a matter of federal law a United States marshal's conducting a judicial foreclosure sale constitutes "seizing or levying" within the meaning of 28 U. S. C. § 1921.* As respondent concedes, this decision conflicts with the decisions of three Courts of Appeals that have held that costs could not be taxed under § 1921 in cases involving judicial foreclosure sales. See *Travelers Insurance Co.* v. *Lawrence*, 509 F. 2d 83 (CA9 1974); *James T. Barnes & Co.* v. *United States*, 593 F. 2d 352 (CA8 1979); *Federal Land Bank of Saint Paul* v. *Hassler*, 595 F. 2d 356 (CA6 1979). I would grant certiorari to resolve this conflict.

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*Title 28 U. S. C. § 1921 provides in relevant part:

"Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:

. . . . .

"For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1½ per centum on the excess of any sum over $1,000."